Supreme Court, U. S.
FILED
AUG 17 1942
CHARLES ELMORE CROPLEY
CLERK

(18)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

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# No. 312

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DE BARDELEBEN COAL COMPANY, INC.,
*Petitioner,*

*vs.*

MRS. LOLA MACOMBER, ADMINISTRATRIX OF THE ESTATE OF JOHN B. MACOMBER.

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA AND BRIEF IN SUPPORT THEREOF.

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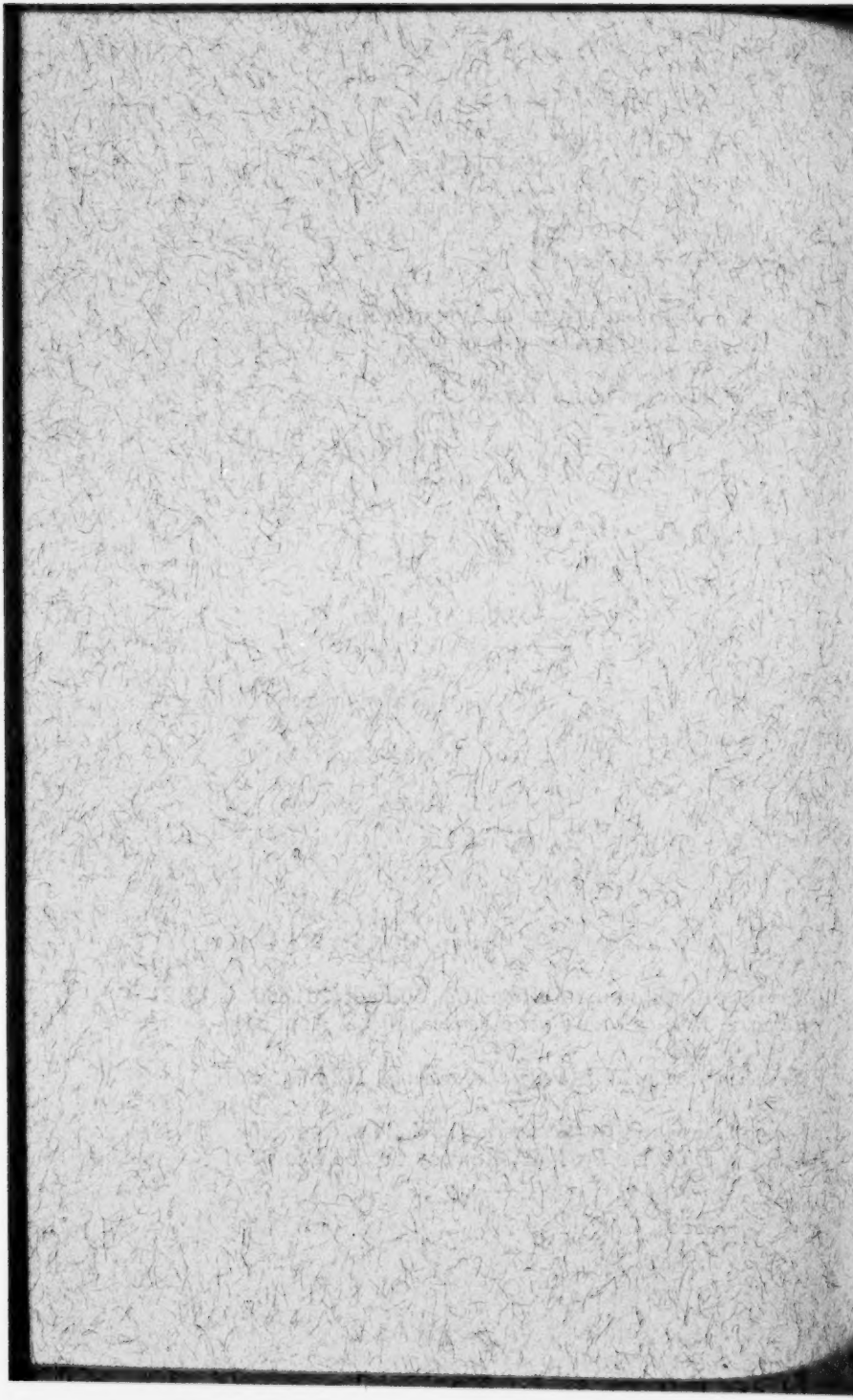

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

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*To the Honorable the Supreme Court of the United States:*

The petition of the DeBardeleben Coal Company, Inc., petitioning from a final decree of the Supreme Court of Louisiana reversing a decree of the Court of Appeals for the Parish of Orleans and allowing a recovery by the Respondent in the sum of some Seven Thousand Two Hundred Sixty-nine and 40/100 ($7,269.40) Dollars, respectfully shows to this Honorable Court:

I.

That Mrs. Lola Macomber, Administratrix of the Estate of John B. Macomber, brought a suit under the provisions

of the Act of Congress of March 4, 1915, Chapter 153, 38 Statutes, 1185 and as amended by the Act of June 5, 1920, C. 250, 41 Statutes 1007, United States Code 688, known as the Jones' Act, in the Civil District Court for the Parish of Orleans, to recover damages for the death of her husband, a deckhand on the Steam Tug "CLARA" owned and operated by Petitioner.

The case was tried before a jury under the peculiar law of Louisiana which makes the jury the judge of both the law and the facts and does not require a unanimous verdict. The jury returned a verdict in the sum of Seven Thousand Two Hundred Sixty-nine and 40/100 ($7,269.40) Dollars. Upon appeal to the Court of Appeals for the Parish of Orleans, which has jurisdiction over all suits of this nature, the verdict of the jury was reversed. The majority opinion stated:

> "In our opinion this case, if it had been tried in the Federal Court, would not have gone to the jury but would have been disposed of by a directed verdict pursuant to the procedure prevailing in that court."

A writ of certiorari was granted by the Supreme Court which then reversed the opinion of the Court of Appeals for the Parish of Orleans and reinstated the verdict of the jury. Chief Justice O'Neill dissented.

The evidence in this case consisted of the testimony taken by deposition of the deckhand by the name of Edgecombe, the testimony of the pilot of the Tug, Arthur A. Smith, the testimony of the Chief Engineer, Barichivick, the testimony of Captain Angelo and the testimony of the Assistant Engineer, Wuertz, taken in open court. All of these witnesses were witnesses for the Defendant and all the testimony bears out the majority opinion of the Court of Appeals quoted above.

## II.

The facts of the case are briefly these:

Macomber and another deckhand of the Steam Tug "CLARA" were of their own volition and without orders from the officers of the Tug "CLARA", washing the smokestack of the "CLARA" while the vessel was proceeding through the Intracoastal Canal. Macomber fell overboard through no negligence of the ship, its officers or crew, nor because of defective equipment. He fell overboard some seven or eight feet from the stern of the vessel. Edgecombe, the deckhand who was assisting him and who was standing at the foot of the ladder, attempted to grab Macomber as he went overboard and then, making an instantaneous decision, decided that the best thing to do was to stop the Tug rather than attempt to get a life preserver and throw it to him. The canal at this point was some one hundred feet wide and the deceased, if he could have swum, could have easily swum to shallow water. The Tug was stopped and every effort was made to save the deceased. There is no evidence in the record that the deceased could swim. The testimony of the Master of the Tug, the pilot, Edgecombe and the Chief Engineer was to the effect that the throwing of a life preserver would have been of no assistance to this man, in view of the fact that the tug was proceeding at a speed of between seven and nine miles an hour, and in view of the fact that the ladder from which Macomber had fallen was between Edgecombe and the place where the life preserver was. They testified further that if the man could have swum the distance necessary to reach a life preserver, he could have easily saved himself by either swimming to shallow water, some thirty-five feet, or to a beacon which was close to where he fell overboard. The wind would have blown the life preserver from him although there was a current running against the Tug be-

tween one and two miles an hour. The only evidence in the record on behalf of the plaintiff was the testimony which had been taken by the Defendant in a suit then pending in the United States District Court which was afterwards dismissed by the plaintiff. The other evidence in the record is the evidence of the Defendant. There is no dispute as to the facts. There is no question in the record as to the facts. The Supreme Court, in holding that the jury had a right to disbelieve the testimony of the witnesses for the Defendant, laid great weight upon testimony which had been taken before what it called the Marine Investigating Board, which was a hearing before the United States Steamboat Inspectors and which was expressly excluded from the evidence by the trial court and was never before the jury. The attorney for the Respondent, at no time suggested to either the Court of Appeals or the Supreme Court that there was any error in excluding this testimony as hearsay. The uncontroverted testimony, therefore, shows that a life preserver would have been of no use to the deceased; that if he could have swum to a life preserver, he could have saved himself by swimming to shallow water; that under no theory of law was the failure to throw a life preserver either negligence or the proximate cause of the accident.

## III.

### Reasons for the Allowance of This Writ.

On this state of facts, there are the following reasons why this application should be granted:

1. The Supreme Court of Louisiana has decided a Federal question of substance not heretofore determined by this court, but in a way which is contrary to all the decisions of this Honorable Court interpreting the Federal Employer's Liability Act, 45 U. S. C. A., Sections 51-59,

in particular the decision of *Atchison T. & S. F. Ry. Co.* v. *Toops*, 281 U. S. 351; 50 S. Ct. 281.

2. The decision of the Supreme Court of Louisiana is contrary to the decisions of the United States Court of Appeals that have passed upon the same identical question.

3. The Supreme Court of Louisiana allows the plaintiff to recover, where as a matter of law, there should be a directed verdict for the defendant.

4. The Supreme Court of Louisiana, in reaching its decision, considered testimony taken before the United States Local Inspectors, which was never in evidence or before the jury, having been excluded by the trial judge on the basis of decisions of the Supreme Court of Louisiana, and in particular, *Fegan* v. *Lykes Bros. S. S. Co.*, 199 So. 635; 196 La. 450.

This case arises under a Federal statute and involves a question of importance and substance. The decision of the Supreme Court of Louisiana has definitely changed the well-enunciated doctrine of this Court in interpreting the Jones Act, for the reason that it has decided a case in favor of a plaintiff where there was no evidence of negligence and where, if there were negligence, the negligence could not have been the proximate cause of the death of the seaman. In fact, the doctrine of proximate cause has been completely written out of the law and in lieu thereof a doctrine has been enunciated to the effect that if under any possible theory, no matter how far-fetched, a seaman who has fallen overboard could be saved by the throwing of a life preserver, the failure to do so would be the proximate cause of the accident. The Court by its decision holds that the failure to throw a life preserver, under any circumstances —no matter how far the seaman is from the vessel and no matter how remote the possibility of saving him by throw-

ing a life-preserver—is negligence, even though the seaman only has a moment to elect whether to throw a life-preserver or stop the vessel. It has decided that under the Jones Act a plaintiff does not have to prove with any degree of certainty that the seaman would have been rescued but for the failure to throw a life-preserver.

It is submitted that the petition should be granted, because:

1. This Honorable Court has held that where a question is presented as to whether or not there is no substantial evidence to show negligence on the part of the defendant steamship company, and that, as a matter of law, there should have been a judgment against the plaintiff, the Supreme Court will examine the evidence and take jurisdiction of the case.

2. The case clearly enunciates a doctrine of law in a matter which has not been passed upon by this Court, but is contrary to its decisions under the Federal Employers' Liability Act.

3. The decision is contrary to the following decisions of the United States Court of Appeals:

*New York Central Railroad Company* v. *Grimstad,* 264 Fed. 334;

*Harris* v. *Pennsylvania Railroad Company,* 50 F. (2d) 866;

*Kirincich* v. *Standard Dredging Company,* 112 F. (2d) 163.

4. The decision of the Supreme Court of Louisiana in this case is also contrary to the general law of torts which is generally phrased as follows:

> "Where the act is the failure of a legal duty, causation is only established when the doing of the act would have prevented the result. If the result would

> have happened just as it did whether the alleged actor had done his duty or not, the failure to perform his duty was not a factor in the result, or in other words, did not cause it."

This is the general rule of law enunciated under the Federal Employers' Liability Act in the following cases: *Lynch* v. *Delaware L. N. W. Railway Company,* 58 F. (2d) 177 (C. C. A. 2); *Shroble* v. *Lehigh* (C. C. A. 2), 62 F. (2d) 993; *Atchison T. & S. F. Ry. Co.* v. *Toops,* 281 U. S. 351; 50 S. Ct. 281; 74 L. Ed. 896.

There is no evidence whatsoever in the record to support the conclusion of the Supreme Court that there was any reasonable probability that the throwing of a life-preserver would have rescued or saved the deceased. Instead of that, all the evidence is to the contrary and, therefore, the decision of the Court of Appeals is correct when it states that under the Federal jurisprudence and under the cases cited, there ought to have been a directed verdict for the Defendant.

The Supreme Court does not say that in its opinion the decision of the jury was correct, but says that the jury should not be overruled if there was some evidence to go to the jury. In Louisiana a jury is the judge of the facts and the law, and it is the law of Louisiana that there cannot be a directed verdict. It is further the law of Louisiana that where the jury is clearly erroneous, it should be reversed upon appeal. *Lewis* v. *Louisiana Northwestern Railroad Company,* 2 La. App. 175; *Hebert* v. *New Orleans Public Service,* 10 La. App. 341; 119 So. 575. The Supreme Court, therefore, must either accept the law of Louisiana insofar as the jury trial is concerned or have a jury trial similar to the jury trial of the Common Law Courts where the jury must take the law from the judge and where the Lower Court has the right to direct a verdict. The failure of this

Honorable Court to take jurisdiction will mean that recovery may be had in Jones' Act cases in Louisiana State Courts, under this decision and under the decision of *Fegan* v. *Lykes Brothers,* 3 So. (2d) 632, where recovery could not be had in the Federal Court as a matter of law. These two decisions definitely write out of the law the question of proximate cause and substitute therefor a doctrine that if the accident, in any way, contributed to the injury, there should be a recovery, no matter whether it was the proximate cause of the injury or not. It does away also with the burden of proof being on the plaintiff, because the plaintiff in this case does not submit any evidence other than the evidence of the Defendant's own witnesses and they are definitely to the effect that the failure to throw the life preserver was not the proximate cause of the death of the deceased.

It is respectfully submitted that the decision of the Court of Appeals is the correct law and in accordance with the law as determined by the Court of Appeals for the First, Fourth and Fifth Circuits.

WHEREFORE, your Petitioner prays that a writ of certiorari issue under the seal of this Honorable Court, directing the Supreme Court of Louisiana and commanding that court to certify and to send to this Court for review a full and complete transcript of the record and all proceedings in the court, known and entitled on its docket: "Mrs. Lolla Macomber, Administratrix of the Estate of John B. Macomber, Plaintiff and Appellant, Versus DeBardeleben Coal Company, Inc., Defendant and Appellee, No. 36,526," and that the said decree of the Supreme Court of Louisiana be reversed and rendered as to the issue of Respondent's liability in accordance with the foregoing petition and the decree of the Court of Appeals for the Parish of Orleans.

RICHARD B. MONTGOMERY.